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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1031

R. W. BROOKS, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA AND C. A. FIRTH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	4
Reasons for granting writ	6
I. The decision of the lower court that the United States District Court for the District of Arizona had jurisdiction to quiet title to water rights in New Mexico is in conflict with a decision of the United States Circuit Court of Appeals for the Tenth Circuit	6
II. The decision of the lower court that the decree affects title to water rights in New Mexico appears to be in conflict with analogous decision of this Court	9
III. The decision of the lower court that the United States District Court for Arizona has jurisdiction to directly control the Gila River, canals, and headgates in New Mexico is in conflict with analogous decisions of this Court	10
IV. In a decree rendered by the United States District Court for the District of Arizona where there were acts necessary to be performed in New Mexico for the enforcement of such decree and the performance of which acts required the assent of New Mexico, and where the latter state prevented the performance of such acts, it became an indispensable party without whose presence said decree could not be enforced in New Mexico	11
V. The Circuit Court's decision that the Sunset Canal Company and the Sunset Ditch	

Page

Company were legal entities is in conflict with analogous decisions of this Court ... 12

VI. The court below erred in denying the motion to quash service in New Mexico upon Parley P. Jones, C. W. Brooks, and Rachel Jensen as Directors of the Sunset Canal Company of the rule to show cause issued out of the United States District Court of Arizona 13

VII. The Circuit Court's decision affirming the ruling of the trial court denying petitioners' offer to show that the water used by them, which use is alleged to have been in contempt of court, if it had not been so used would not have benefited lower appropriators is in conflict with an analogous decision of this Court 14

VIII. The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit 15

IX. The court erred in deciding that petitioners had violated the decree and order of the court 16

X. The decision of the lower court affirming a judgment imposing a fine upon each petitioner of $100.00 for the use of water commissioner Firth is in conflict with analogous decisions of other circuit courts because said fine was not limited to the amount of expenses and damage caused Firth by the disobedience of the orders of the court, and was arbitrary and punitive 19

Importance of case 21

Conclusion 22

Appendix 23

Page

TABLE OF AUTHORITIES CITED.

Cases:

Albion-Idaho Land Co. v. *Naf Irrigation Co.*, 97 F. 2d 439-444 ..... 7, 15
Bean v. *Morris*, 221 U. S. 485 12
Berry v. *Midtown* (2 Cir.) 104 F. 2d 107 17
Carpenter v. *Strange*, 141 U. S. 87, 106 10
Christensen Engineering Co. v. *Westinghouse Air Brake Co.* (2 Cir) 135 Fed. 774 20
Fall v. *Eastin*, 215 U. S. 1 10
Krentler-Arnold Hinge Last Co. v. *Leman* (1 Cir) 50 F. 2d 699 20
McCrone v. *United States*, 307 U. S. 61 19
Morgan v. *United States* (8 Cir.) 95 F. 2d 830 18
New Jersey v. *New York*, 283 U. S. 335 12
New Mexico Products Co. v. *New Mexico Power Co.*, 42 N. M. 311, 77 Pac. (2) 634 9
Norstrom v. *Wahl* (6 Cir.) 41 F. 2d 910 20
Oklahoma Natural Gas Co. v. *Oklahoma*, 273 U. S. 634 13
Probst, In re, (2 Cir) 205 Fed. 512 17
Rickey Land & Cattle Co. v. *Miller & Law* (9th Cir.) 152 Fed. 11, 218 U. S. 258 7
Rivers v. *Miller* (5 Cir.) 112 F. 2d 439 20
Robertson v. *Railroad Labor Board*, 268 U. S. 619 14
Van Horst v. *Thompson*, 18 F. 2d 177 9
Washington v. *Oregon*, 297 U. S. 517 15

Texts and Miscellaneous:

14 Am. Juris. p. 430, Sec. 238 8
1 Beale on Conflict of Laws, p. 245 8
21 C. J. S. p. 53 8
2 Kinney on Irrigation and Water Rights (2 ed.) p. 238 9
Long on Irrigation, Sec. 273, pp. 471 8
Tennessee Law Review, Vol. X, No. 4, "Conflicting Interests of States over Interstate Waters" by Chas. N. Burch 12
1 Wiel on Water Rights in Western States (3 ed.) p. 708 ..... 8, 15
Secs. 344-345, pp. 371-373 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above case on March 10, 1941, affirming a judgment of the United States District Court for the District of Arizona.

Opinion Below.

The opinion of the Circuit Court of Appeals is not reported but is in the record, pages 290-318. The Judge of the District Court did not deliver an opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reversed was entered on March 10, 1941 (R. 290-318). The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936-938).

Question Presented.

Appellee Firth filed his petition (R. 46) for a rule on petitioners and other defendants, New Mexico water users, to show cause why they should not be punished for contempt of a consent decree and orders of the United States District Court for the District of Arizona entered in an action brought by the United States to quiet title to water rights on the Gila River in Arizona and those of petitioners on the same river in New Mexico. By its order the court levied an assessment on lands of petitioners in New Mexico to pay Firth for his services as water commissioner appointed by the court to enforce the decree and distribute the waters of the Gila River to the owners of water rights in New Mexico and Arizona according to their respective priorities as determined by said decree.

The Water Commissioner had the right to institute this proceeding to protect his pecuniary interest in the decree. The petitioners were prosecuted, not because they deprived lower appropriators of water in defiance of the decree, but because they did not pay Firth and used the water without paying him (R. 251).

Petitioners were found guilty of civil contempt and fined $100.00 each, said fine to be paid to Firth (R. 146).

The questions presented are:

I.

Whether the United States District Court for the District of Arizona had jurisdiction of an action to quiet title to water rights in New Mexico.

II.

Whether the decree of the United States District Court for Arizona quieting title to water rights in New Mexico affects the title to such water rights in the latter State.

III.

Whether the United States District Court for Arizona has jurisdiction to directly control the Gila River, canals, and headgates on the river in New Mexico.

IV.

Whether the State of New Mexico is an indispensable party to the enforcement of a decree of the United States District Court for Arizona which required acts to be performed in New Mexico where the State of New Mexico prevented the enforcement of such acts.

V.

Whether a corporation which has been dissolved can be adjudged guilty of contempt of court for violation of a decree rendered after its dissolution.

VI.

Whether the United States District Court for Arizona had jurisdiction of directors of a corporation by service of its process upon them in New Mexico.

VII.

Whether a decree quieting title to water and enjoining upper appropriators from taking the water is violated by the upper appropriators taking water which would not have reached the lower appropriators and could not have been applied to beneficial use by the lower appropriators.

VIII.

Whether impossibility of performance of a decree is not a defense to a charge of violation of such decree and an injunction issued therein.

IX.

The court erred in deciding that the petitioners had violated the decree and order of the court.

X.

The decision of the lower court affirming a judgment imposing a fine upon each petitioner of $100.00 for the use of Water Commissioner Firth is in conflict with analogous decisions of other circuit courts because said fine was not limited to the amount of expenses and damage caused Firth by the disobedience of the orders of the court, and was arbitrary and punitive.

Statement.

Appellee Firth by his petition (R. 46) alleged that he had been appointed Water Commissioner by the court to enforce the decree and orders of the court, and that there had been levied on the lands of the defendants in the original action an assessment on each acre of land upon which they had a water right, as shown by the decree, to pay him his salary and expenses as such Water Commissioner.

That upon the failure of defendants to pay said assessments Firth was directed by said order to refuse delivery of water to any party entitled to divert so long as such user remained in default.

That on January 1, 1939, the defendants, water right owners in New Mexico, were in default and on that day Firth locked the gates on the canals in New Mexico carrying water to said land owners and notified them not to use water from the river until the assessments had been paid.

On January 4, 1939, the State Engineer of New Mexico, acting under orders of the Governor of the State of New Mexico, ousted Firth from possession of the river and canals of New Mexico and proceeded to administer the waters of said river without regard to said decree and that the said defendants, and among them these petitioners, used said water in violation of said decree.

Appellee alleged upon information and belief that the State Engineer and his subordinates were acting as agents of the New Mexico defendants.

The original action was brought by the United States in the United States District Court of Arizona against the claimants of water rights on that part of the Gila River as it flows between a line ten miles east of the parallel to the boundary of New Mexico and Arizona and the junction of the river with Salt River in Arizona to quiet title of said parties to said water rights on said stream (R. 23).

A court decree was entered in the cause upon the written stipulation of the parties. The court reserved jurisdiction to appoint a water commissioner to enforce the decree, to fix his compensation and the manner of payment, and directed the Commissioner to deny any defendant the right to use the waters in case of his failure or refusal to obey the orders of the court. The decree perpetually enjoined the defendants and their heirs, assigns, and successors in interest from making any claim to or diverting said waters except as specified in the decree.

As shown by the contempt judgment (R. 145-146) thirty-two defendants were fined. Originally there were seventy-two defendant appropriators irrigating lands in that part of the river in New Mexico covered by the decree (R. 47-48).

The petitioners offered to prove that half of the defendants had either died or had leased or sold their lands and were not before the court in the contempt proceedings (R.

175). The petitioners offered to prove that the water taken from the river by petitioners was necessary to save their crops and by reason of the physical character of the stream bed if said water had not been taken it would not have benefited the lower users (R. 173-174).

The Governor of New Mexico directed the State police to cause Firth to desist from administering the waters of the river and put the State Engineer in full possession of the facilities of administering the waters of the same (R. 94).

The court fined each of the petitioners the sum of $100.00 for the use of Firth to pay expenses incurred by him in prosecuting petitioners and for such other expenses as he might incur in the administration of the decree (R. 146).

Reasons for Granting the Writ.

I.

The decision of the lower court that the United States District Court for the District of Arizona had jurisdiction to quiet title to water rights in New Mexico is in conflict with a decision of the United States Circuit Court of Appeals for the Tenth Circuit.

The lower court in its opinion said (R. 291-292):

> "Without going into detail as to the terms of the decree it is sufficient for the purposes of this case to say that it determines the rights of all the water users in and to the waters of the Gila River within the state of New Mexico and within the state of Arizona with great detail and enjoins each of the parties from interfering with the water rights of the other parties to the decree, as therein determined.
>
> * * * * * * *
>
> "It is uniformly held that an action to determine such rights is not a transitory action. Consequently a court would be limited to the determination of such water rights and only such water rights as are located within

its territorial jurisdiction. The difficulty in applying the ordinary rule as to jurisdiction is that the determination of water rights in the case of an interstate stream would often be entirely inconclusive and might be wholly futile unless the amount of water which should enter the state is also fixed and determined."

The United States Circuit Court of Appeals for the Tenth Circuit in *Albion-Idaho Land Company* v. *Naf Irrigation Co.*, 97 F. (2d) 439, said at page 444:

> "A suit to adjudicate water rights is a local action. The Hart decree undertook to adjudicate water rights beyond the jurisdiction of the court and was void on its face." Citing *Rickey Land and Cattle Co.* v. *Miller and Lux* (9 Cir.) 152 Fed. 11, 14, 15, affirmed 218 U. S. 258.

The same court further said:

> "The trial court did not undertake and indeed had no jurisdiction to adjudicate the several priorities of the users on the stream, since the points of diversion and the lands irrigated from the stream of the lower group are situated in the State of Idaho and beyond the territorial jurisdiction of the court." Citing 28 U. S. C. A. Secs. 113-166; *Vineyard Land & Stock Co.* v. *Twin-Falls S. R. L. & W. Co.* (9 Cir.) 245 Fed. 9, 25, 26; *North Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 56 U. S. 233; *Matarazzo* v. *Hustis* (D. C. N. Y.) 256 Fed. 882, 886; *Massie* v. *Watts*, 10 U. S. 148, and Federal cases above cited.

The Circuit Court of Appeals in the instant case endeavors to reconcile its decision with the decision of the Tenth Circuit Court of Appeals in the *Albion* case. Such reconciliation is impossible. In the *Albion* case the court said (p. 445):

> "The sole province of the trial court was to divide the waters between the users in the state of Utah and

> the users in the state of Idaho, and leave the division of the waters among the several users in the upper group to the state court decree to which they were parties and among the several users in the lower group to the federal court decree to which they were parties."

In the *Albion* case the water users in the lower State, Idaho, filed their suit in the upper State, Utah, for an injunction not to quiet title but to restrain the commission of a tort in the upper State where the United States District Court in the upper State had jurisdiction of both the rem and the person of the defendants within that territorial jurisdiction, and the court examined the decrees theretofore entered in the two States establishing priorities and ordered the defendants in the upper State, Utah, not to use more than a certain amount of water and to permit a definite amount of water to pass over the State line into the lower State; but did not quiet title or attempt to say what individual water users beyond its territorial jurisdiction owned or limit their individual use.

The interpretation by the Tenth Circuit Court of the *Miller and Lux-Rickey* case is supported by all the text writers of this country on water rights. See 1 Wiel on *Water Rights in Western States* (3d Ed.) Secs. 344-345, pp. 371-373; Long on *Irrigation*, Sec. 273, pp. 471-472. To the same effect regarding jurisdiction of the res, sec 21 *C. J. S.* p. 53; 14 *Am. Juris.* p. 430, Sec. 238; Beale on *Conflict of Laws*, Vol. 1, p. 425.

The Circuit Court below said (R. 292),

> "The difficulty in applying the ordinary rule as to jurisdiction is that the determination of water rights in the case of an interstate stream would often be entirely inconclusive and might be wholly futile unless the amount of water which should enter the state is also fixed and determined."

as the reason for exercising jurisdiction to quiet title in New Mexico.

The Supreme Court of the United States alone has original and exclusive jurisdiction to determine the equitable apportionment of water between states. If the reasoning of the circuit court in the instant case is sound, a suit might be instituted in the United States District Court at Galveston, Texas, to quiet title to water rights in the upper reaches of the Rio Grande in Colorado, a thousand miles away.

The unsoundness of this view is pointed out by the court in *Van Horst* v. *Thompson,* 18 F. 2d 177, by the District Court of Columbia Appeals:

> "The Iowa court would have had no jurisdiction whatever to quiet the title in the plaintiff there to land here, if her petition had asked for that relief, and any decree of that court so attempting would have been innocuous. When that suit was brought, the plaintiff could not know whether or not the defendants would appear, unless there was a prior agreement between the parties to that effect, which is not claimed."
>
> "Water rights are real property." Citing 2 Kinney on *Irrigation and Water Rights* (2d Ed.) p. 238. *New Mexico Products Co.* v. *New Mexico Power Co.* 42 N. M. 311, 77 Pac. (2) 634.

The Lower court, however, held that jurisdiction of the res in New Mexico was conferred on the court by the consent of the defendants.

II.

The decision of the lower court that the decree affects title to water rights in New Mexico appears to be in conflict with analogous decision of this Court.

The lower court held (R. 308):

> "The injunction in the case at bar was not only directed to the individual defendants but to their successors in interest and such successors are guilty of contempt in violating the injunction. The trial court having power to decide the relative rights of the liti-

> gants in New Mexico and Arizona, as we hold, was also capable of enforcing its decree against such parties and their successors whether or not the decree be regarded as one strictly or quasi in rem or in personam as to them."

It appears that the decision of the lower court is in conflict with this Court in *Fall* v. *Eastin*, 215 U. S. 1, 11. The lower court held that the decree (R. 308) was binding upon defendants' successors in interest in the water rights in New Mexico. In *Fall* v. *Eastin* this Court declared that a "court not having jurisdiction of the res cannot affect it by its decree."

The decision in this case gives the decree by its own force the effect of constructive notice to innocent purchasers that the water rights are subject to the control of the United States District Court for the District of Arizona.

III.

The decision of the lower court that the United States District Court for Arizona has jurisdiction to directly control the Gila River, canals, and headgates in New Mexico is in conflict with analogous decisions of this Court.

It appears that the decision of the lower court is in conflict with the decision of this Court in *Carpenter* v. *Strange*, 141 U. S. 87, 106, and other decisions relied on by the court in that case. The decree and orders of the court directed the Commissioner to go into the State of New Mexico and take charge and control of the diversion and distribution of the waters of the Gila River (Appendix paragraphs XII, XIII, of the decree, pp. 25-27). The decree does not enforce its provisions with respect to the diversion and distribution of the waters of the Gila River in New Mexico by coercion of defendants, but by and through the Water Commissioner.

It is respectfully submitted that the lower court does not successfully avoid the effect of the decree by saying that (R. 315):

> "The water commissioner appointed by the court at the instance of the appellants, if we regard him as agent of the appellants, as he must be regarded, is clearly entitled to enter the State of New Mexico and to carry on operations of his agency so long as he violates no state statute. If the state in the exercise of the police power has enacted laws to control the manner of the diversion of water it would be his duty to conform to those laws."

The lower court holds that if the petitioners prevented Firth from carrying on "operations of his agency in New Mexico," they were guilty of civil contempt. The lower court found (R. 143):

> "That * * * the respondents * * * have violated the terms of the said decree and orders of court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt."

IV.

In a decree rendered by the United States District Court for the District of Arizona where there were acts necessary to be performed in New Mexico for the enforcement of such decree and the performance of which acts required the assent of New Mexico, and where the latter State prevented the performance of such acts, it became an indispensable party without whose presence said decree could not be enforced in New Mexico.

The Governor of the State of New Mexico ordered the Chief of the State Police to oust the Water Commissioner

from control of the waters of the Gila River of New Mexico and place the same in the custody of the New Mexico State Engineer (R. 225).

This Court in *Rickey Land and Cattle Company* v. *Miller and Lux, supra,* said:

> "It is true that the acts necessary to enforce it (the decree) must be done in California, and require the assent of that state so far as this court does not decide that they may be demanded as in consequence of whatever right, if any, it may attribute to Nevada." *Bean* v. *Morris,* 221 U. S. 485.

If the assent of New Mexico is required so that the decree may be enforced in New Mexico, then whether or not it may be required was beyond the jurisdiction of the lower court to decide. The court could not presume that the State had given its assent.

The rights of New Mexico in the waters of the Gila River are not limited by the strict application of the legal principle of appropriation. *New Jersey* v. *New York,* 283 U. S. 335. See also "*Conflicting Interests of States Over Interstate Waters,*" by Chas. N. Burch in Vol. X, No. 4, *Tennessee Law Review.* Mr. Burch was the master appointed by this Court in *New Jersey* v. *New York, supra.*

V.

The Circuit Court's decision that the Sunset Canal Company and the Sunset Ditch Company were legal entities is in conflict with analogous decisions of this Court.

The trial court found (R. 131) that the Sunset Ditch Company was incorporated in New Mexico in 1903 and that at the time of filing the complaint in the original suit the Sunset Ditch Company was and still is a corporation doing business in Arizona and New Mexico under the name of Sunset Canal Company, defendant in the original action and re-

spondent in this proceeding, and that the two companies are identical.

The record shows that the Sunset Ditch Company was dissolved on June 14, 1920 (R. 219), prior to the filing of the complaint and entry of the consent decree in the original proceeding.

It is not claimed that the Sunset Canal Company existed independently of the Sunset Ditch Company.

The Circuit Court said in its opinion (R. 313):

> "The Court found that the diversion ditches were operated by the Sunset Canal Company and the appellants were acting by and through such Canal Company in taking and receiving the water diverted from the Gila River and that they were responsible for the violation of the order of the court and were, therefore, guilty of contempt of court. The appellants were diverting the water from the Gila River and in so doing were operating in the name of the Canal Company."

The dissolution of the Sunset Ditch Company "cannot be distinguished from the death of a natural person in its effects." *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U. S. 634.

VI.

The Court below erred in denying the motion to quash service in New Mexico upon Parley P. Jones, C. W. Brooks, and Rachel Jensen as Directors of the Sunset Canal Company of the rule to show cause issued out of the United States District Court of Arizona.

The petitioners, Parley P. Jones, R. W. Brooks, and Rachel Jensen were defendants in the original action. In this proceeding they were made respondents individually and as directors of the Sunset Canal Company (R. 73). They were served in New Mexico by the United States

Marshal of New Mexico individually and as directors of the Sunset Canal Company (R. 68-69). The court below overruled their motion to quash service upon them as directors (R. 129). The Circuit Court of Appeals affirmed this ruling on the ground that as they were defendants in the original suit they were only entitled to notice (R. 310).

It is respectfully submitted that while they were defendants individually they were not defendants as directors of the Sunset Canal Company, and that the service upon them as such directors was void.

In *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622, this court said:

> "Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district (Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Ex parte Graham, 3 Wash. C. C. 456, Fed. Cas. No. 5,657); and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district (Toland v. Sprague, 12 Pet. 300, 330, 9 L. ed. 1093, 1105). Such was the general rule established by the Judiciary Act of September 24, 1789, Chap. 20, §11, 1 Stat. at L. 73, 79, Comp. Stat. §1033, in accordance with the practice at the common law."

VII.

The Circuit Court's decision affirming the ruling of the Trial Court denying petitioners' offer to show that the water used by them, which use is alleged to have been in contempt of Court, if it had not been so used would not have benefited lower appropriators is in conflict with an analogous decision of this Court.

The Circuit Court said (R. 315):

> "The fact is that the appellants, as a result of the action of the officers of the State purporting to act for

> the State, but really acting for them, took more water from the Gila River than they were entitled to under the terms of the decree and used it on their land with full knowledge that to do so was to violate the decree."

Petitioners offered to show that owing to the physical condition of the stream bed, the water of the Gila River used by them, if permitted to flow down stream, would not have benefited the lower appropriators. This offer was denied (R. 171-174).

The ruling was in conflict with the decisions of this Court in *Washington* v. *Oregon*,, 297 U. S. 517-523, and the United States Circuit Court of Appeals for the Tenth Circuit in *Albion-Idaho Land Company* v. *Naf Irrigation Co.*, 97 F. 2d 439-444.

Mr. Wiel in *Water Rights in Western States*, at page 708, states:

> "The modern rule is to regard injunctions granted to appropriators as based strictly upon beneficial use and as not restraining a defendant while the plaintiff is not himself using the water, even if the decree does not (as it should) expressly so declare." Citing cases.

VIII.

The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit.

The trial judge refused to permit petitioners to show that the title to one-half of the lands and water rights described in and adjudicated by the decree had passed into the hands of innocent purchasers who were not defendants to the original action or respondents named by Firth in his original petition (R. 175-176).

As a result of this change of ownership the decree and orders of the court were unenforceable because the lands of both the petitioners and said purchasers are served by the same canal, and that it is impossible to divert and distribute the waters during the irrigation season to the petitioners in the manner provided in the decree and orders of the court when at the same time the other water users not subject to the decree would exercise their rights to divert and use the water according to their New Mexico appropriations.

IX.

The court erred in deciding that petitioners had violated the decree and order of the court.

Firth instituted this suit to enforce an order made for his benefit. The order provides (R. 58-59):

> "It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof. * * *
>
> * * * * * * *
>
> "The Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre."

The petitioners were not diverters. The right to divert was granted to the Sunset Canal Company (Appendix, paragraphs V and VIII, pp. 23-25, nor did the petitioners

divert water from the Gila River. It was diverted by the State of New Mexico (R. 53-54).

Firth did not make demand on petitioners for the payment of the acreage assessment (R. 204). He ordered the petitioners to quit using the water, but the court had not authorized him to do more than to refuse to deliver water to the diverters in default.

The Circuit Court in its opinion states (R. 312) that "the parties were enjoined from using any water while in default." We fail to find authority for this statement in the decree or order. The pertinent provisions of the decree are set out in the Appendix to this petition (Appendix, Decree, paragraphs XII and XIII, pp. 25-27; the order is set out at pages 57-60 of the record.

As long as the Water Commissioner was in control of the diversion of the water he could cut it off. He needed no further delegation of power to collect from the diverter. The order did not provide for the situation brought about by the State of New Mexico in ousting the Water Commissioner and putting its water master in control of the river.

In the case of *In re Probst* (2 Cir.), 205 Fed. 512-513), the court said:

> "Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. * * * This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

The same court in *Berry* v. *Midtown* (2 Cir.), 104 F. (2d) 107-111, said:

> "Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby

> imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

Quoting from *Probst* case, *supra,* the court in *Morgan* v. *United States* (8 Cir.), 95 F. (2d) 830-836, said:

> "That we are in accord with the quoted declaration of the court, as to our duty to pay scrupulous attention to the limitation imposed by Congress upon the power of the court to punish for contempt, appears from the following expression of this court in Wilson *v.* United States, 8 Cir. 25 F. (2d) 215, 218: 'Section 385 is a limitation on the power of the inferior federal courts to punish for contempt, Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205; and the power must be exercised within the restrictions therein named.' "

Firth was ordered to collect from the diverter, the Sunset Canal Company, and if the Canal Company defaulted he was directed to refuse to deliver the water it to.

There is no charge or proof of a conspiracy to violate the decree or orders, or that petitioners aided or abetted the violation of the decree, much less is there evidence thereof.

There is no evidence connecting any of the petitioners except Jones with any acts done by the New Mexico officer. The most that can be said is that the petitioners used the water as and when the New Mexico water master delivered it to them.

This proceeding was not prosecuted by the United States or other lower appropriators on the river. It was not alleged that they were damaged, nor did the court find that they were damaged.

Even if the petitioners had paid their individual assessments, there was no assurance that the other water users would pay theirs, and until all paid the Water Commissioner was directed by the decree to refuse to deliver water to the diverter, which, in this case, was the Sunset Canal Company (R. 59).

X.

The decision of the lower court affirming a judgment imposing a fine upon each petitioner of $100 for the use of Water Commissioner Firth is in conflict with analogous decisions of other Circuit Courts because said fine was not limited to the amount of expenses and damage caused Firth by the disobedience of the orders of the court, and was arbitrary and punitive.

The court fined the petitioners $100 each to be paid the Clerk of the court for the "use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree" (R. 146).

This clearly classifies this proceeding as a civil contempt. *McCrone* v. *United States*, 307 U. S. 61-64.

The recovery thus granted Firth amounted to $3,200 or $100 from each of the thirty-two petitioners fined (R. 145-6). The Circuit Court found that the Water Commissioner had been put to an expense of $1,596.55 (R. 317). The only proof of this item is found in a voluminous report of the Commissioner Firth received in evidence over the objection of the petitioners that no opportunity was offered to cross-examine as to contents of said report (R. 203).

When the court announced that he would fine each of the petitioners in the sum of $100, they objected to the amount of the proposed fines because they were not based on any evidence showing that amount of expenses or damage had been incurred by Firth by reason of the petitioners' disobedience to the orders of the court, and because the fines were arbitrary and punitive, and not remedial (R. 246-7).

The Circuit Court of Appeals said (R. 316):

> "The true rule is that the matter of fine is largely a matter of discretion * * *"

This decision of the court is in conflict with the decisions in *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.* (2 Cir.) 135 Fed. 774-782; *Norstrom* v. *Wahl* (6 Cir.) 41 F. 2d 910, 913; *Rivers* v. *Miller* (5 Cir.) 112 F. 2d. 439-443, and *Krentler-Arnold Hinge Last Co.* v. *Leman* (1 Cir.) 50 F. 2d 699.

In *Rivers* v. *Miller, supra,* the United States Circuit Court of Appeals for the Fifth Circuit said:

> "The difference between a civil, as distinguished from a criminal, contempt proceeding, is that the civil contempt is brought for the protection of plaintiff in the rights given him by the order, including reparation or indemnity as to losses suffered through its disobedience. Leman *v.* Krentler-Arnold Co., 284 U. S. 448; Gompers *v.* Buck's Stove & Range Co., 221 U. S. 148. In such a proceeding the court, as part of its order, may fine or otherwise charge the defendant with the expenses and damages caused to plaintiff by the disobedience of the order which constitutes the contempt. Leman *v.* Krentler-Arnold Co., supra; Worden *v.* Searls, 121 U. S. 14, 27; Vilter Mfg. Co. *v.* Humphrey, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A., N. S., 591; State *v.* Northshore Boom Co., 67 Wash. 317, 121 P. 467, Ann. Cas. 1913 D, 456, p. 457; Root *v.* McDonald, 260 Mass. 344, 157 N. E. 684, 54 A. L. R. 1422."

Importance of the Case.

This case is of great importance to all irrigation states traversed by interstate streams, except those in which the rights to the waters of such stream have been settled by original proceedings in this Court or by compacts between the States.

It is of the utmost public importance that this Court determine whether the decision of the lower court in the following particulars is to be the law of all of the irrigation States:

> That although water rights are real property the rule that a court has no jurisdiction over real property outside its territorial jurisdiction does not apply to water rights on interstate streams.
>
> That a court can directly control the water of an interstate stream and canals and ditches thereon outside its territorial jurisdiction.
>
> That a decree is an action to quiet title to water rights on an interstate stream runs with the title to the water rights beyond the territorial jurisdiction of the court rendering the decree.
>
> That a decree is an action to quiet title to waters of an interstate stream can operate by its own power outside the territorial jurisdiction of the court rendering the decree.
>
> That a lower senior appropriator may prevent an upper junior appropriator from using the water which the lower senior appropriator cannot apply to beneficial use. The decision on this point is contrary to the fundamental law of appropriation that "beneficial use shall be the basis, the measure, and the limit of the right to the use of water." Sec. 3280, Revised Code, Arizona, 1928; Sec. 3, Art. XVI, Constitution of New Mexico.

Art. XVI, Constitution of New Mexico.

Also the decision appears to be in conflict with the decisions of this Court and the decisions of other Circuit

Courts of Appeals respecting the power of Federal courts to punish for civil contempt under Judicial Code, Sec. 268.

Conclusion.

It is, therefore, respectfully submitted that this petition for a writ of certiorari be granted.

MERRITT C. MECHEM,
A. T. HANNETT,
Attorneys for Petitioners,
Albuquerque, New Mexico.

APPENDIX.

Decree.

This cause came on to be heard at this term, and thereupon it was shown to the court:

That the plaintiff and the parties defendant whose claims and rights have been presented by answer or stipulation and remain for determination herein, have concluded and settled all issues in this cause as between plaintiff and said parties defendant, and as between said defendants and each of them and every other thereof, and mutually have agreed —all as evidenced, for plaintiff, by the assenting signatures, endorsed at the end hereof, of its solicitors of record and the Attorney General and Secretary of the Interior of the United States, and for said defendants, by the assenting signatures, likewise endorsed at the end hereof personally, or of their several solicitors of record—that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating their claims and rights as against each other in identical form and substance as hereinafter set forth; and the Court upon consideration thereof and of the record herein as to the disposal of the parties defendant who have been separated from the cause, and being duly informed in said premises, doth find, order, adjudge, and declare its decree herein to be as follows, namely: * * *

V.

* * * that rights to divert the waters of the Gila River are decreed to the various canal companies and are set down under their names in the Priority Schedule as of various dates of priority; that the description in each instance of the lands through the irrigation of which said rights were acquired by appropriation and beneficial use and the names of the landowners or their successors in interest, made formal parties defendant herein (and set down under the heading "PARTIES OWNING SAID LANDS WHEN JURISDICTION

ACQUIRED HEREIN"), whose beneficial application of water to said lands supported said appropriatons are also listed under the names of each of said canal companies, the amounts of water in acre feet per season, with the maximum rates of diversion, allowed for the irrigation of the various subdivisions of said lands being given in the so-called individual columns under the general heading "Diversion Right" in said Priority Schedule; all to the end that the diversion rights of said canal companies may be adequately defined, and the individual rights of said defendant landowners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved; that the irrigation season referred to in this Article of the Decree, which shall as well apply to all rights adjudicated herein, is hereby defined as and determined to be the period beginning on January 1st of each year and ending on December 31st of the same year; that the Schedule above referred to and made part hereof is as follows:

* * * * * * *

VIII.

That the diversions of water from the Gila River by the so-called upper valleys defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservoir are decreed herein), comprising the defendant canal companies named below, with the Parties defendant named in the Priority Schedule and attached tables who are decreed rights through the canals of said companies and are served thereunder, and certain individual parties defendant who are accredited with rights to divert directly from the stream through private ditches, to-wit:

Albert Canal Company, Billingsley Extension Canal Company, Black & McCleskey Canal Company, Brown Canal Company, Colmenero Canal Company, Colvin-Jones Canal Company, Cosper & Windham Canal Company, Cosper &

Windham Extension Canal Company (under contract whereby Cosper & Windham Canal Company makes actual diversion), Curtis Canal Company, Dodge-Nevada Canal Company, Duncan Canal Company, Fort Thomas Consolidated Canal Company, Fourness Canal Company, Graham Canal Company, Moddle Canal Company, Montezuma Canal Company, San Jose Canal Company, Sexton Canal Company, Shriver Ditch Company, Smithville Canal Company, Sunflower Canal Company, Sunset Canal Company, Tidwell Canal Company, Union Canal Company, Valley Canal Company, York Canal Company, York Cattle Company.

R. H. Angle, J. H. Brown, T. D. Burton, W. C. Craufurd, J. W. Foote, R. C. Gilleland, J. H. Anderson, C C. Hester, F. E. Ross, R. Sexton, Laura Short; * * *

XII.

That a Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch then being used by the person so disobeying or disregarding such proper orders, rules or directions; promptly reporting to the Court his said action in such case and the circumstances connected therewith and leading thereto; that whenever the necessities of the situation appear to the Court so to require, the Court shall authorize the employment by the Water Commissioner of such person or persons to assist that officer as to the Court may seem necessary to carry out properly the provisions of this decree and the orders of the Court; that the term of employment, expenses and compensation of said Water Commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make; that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and

the Court shall promptly review such action or order and make such order as may be proper in the premises; that the owner or owners of each ditch or canal herein authorized to divert water from the natural flow of the Gila River for direct conveyance to and irrigation of lands, unless specifically excused by the Court or Water Commissioner, shall at his own expense install and at all times maintain at any appropriate place at or near the head of said ditch, a reliable and readily operated regulating headgate and a measuring box, flume or other device which may be locked and set in position—the same to be approved by the Water Commissioner—so that the water diverted into said ditch or canal at any and all times may be regulated and measured; that upon failure of any owner or owners to install structures of the above described character on or before one year from the date of this decree or on or before such different day as the Court or Water Commissioner shall set or determine—after due notice from the Water Commissioner so to do—the said Water Commissioner is herein authorized to cut off diversions of water into said ditch or canal until such devices and structures shall be installed and maintained.

XIII.

That each and all of the parties to whom rights to water are decreed in this cause (and the persons, estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use

or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree; that nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest, under any transfer or legal succession in interest after the commencement of this action to any of the rights hereby adjudicated; that except as hereinbefore mentioned or otherwise stated, the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not; that the several parties to this suit shall pay their own costs in this action as directly incurred or authorized by them respectively, provided that any compensation of the Water Commissioner, or amounts shown to be coming to him or the reporter, if any there be, shall be paid in such manner, at such times and by such parties as may be ordered by the Court; that the Court retains jurisdiction hereof for the limited purpose above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Done in Open Court this twenty-ninth day of June, 1935.

ALBERT M. SAMES,
Judge.

Stipulation for and Consent to the Entry of a Final Decree in the United States District Court for the District of Arizona in the Case of United States of America v. Gila Valley Irrigation District, et al.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto. * * *

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:	
Ahlers v. *Thomas*, 24 Nev. 407, 56 Pac. 93	10
Albion-Idaho Land Co. v. *Naf Irr. Co.*, 97 F. 2d 439	8
Albuquerque Land and Irrigation Co. v. *Gutierrez*, 10 N. M. 177, affirmed 188 U. S. 545	11
Carpenter v. *Strange*, 141 U. S. 87	9
In re Lennon, 166 U. S. 548	10
La Luz Com. Ditch Co. v. *Town of Alamogordo*, 34 N. M. 127, 279 Pac. 72	11
Montezuma Canal v. *Smithville Canal*, 218 U. S. 371	11
Pacific Live Stock Co. v. *Rickey*, 8 F. Supp. 772	10
Rickey Land & Cattle Co. v. *Miller & Lux*, 218 U. S. 258	7, 8, 10, 11
Riverside Water Co. v. *Sargent*, 112 Cal. 230, 44 Pac. 560	11
Salton Sea Cases, 172 Fed. 792, certiorari denied 215 U. S. 603	9
Taylor v. *Hulett*, 15 Idaho 265, 97 Pac. 37	7
Tulare Irrigation District v. *Shepard*, 185 U. S. 1	12
United States v. *Walker River Irr. Dist.*, 11 F. Supp. 158	7
Vineyard Land & Stock Co. v. *Twin Falls S. R. L. & W. Co.*, 245 Fed. 9	7, 9
Willey v. *Decker*, 11 Wyo. 496, 73 Pac. 210	7
Statutes:	
New Mexico Laws, 1917, c. 112, sec. 6	11
New Mexico Laws, 1921, c. 185	11
New Mexico Stat. Ann. (Comp. 1929), sec. 151–112	9
Miscellaneous:	
71 A. L. R. 1351	9
1 Chafee and Simpson, Cases on Equity (1934), pp. 208, 210	9

320605—41

Miscellaneous—Continued. Page

Conflict of Laws, Restatement, sec. 94 9
6 Cornell L. Q. 423 9
17 Harv. L. Rev. 572 9
23 Harv. L. Rev. 390 9
31 Harv. L. Rev. 646 9
35 Harv. L. Rev. 610 9
5 Ill. L. Rev. 442 9
20 Ill. L. Rev. 594, 599 9
14 Minn. L. Rev. 494, 517-529 9
27 Yale L. J. 946 9
30 Yale L. J. 865 9

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1031

R. W. BROOKS ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND C. A. FIRTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not deliver an opinion. The opinion of the Circuit Court of Appeals (R. 290–318) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 10, 1941 (R. 318). The petition for a writ of certiorari was filed on May 7, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The federal District Court for the District of Arizona entered a decree in 1935, in an action brought by the United States against both Arizona and New Mexico landowners, determining the rights of all the parties to the action to the waters of the Gila River in Arizona and New Mexico and enjoining the New Mexico water users from encroaching on the rights of the United States and of the other Arizona water users. The New Mexico defendants to that action appeared generally and asked for cross relief. Petitioners in the present action were adjudicated guilty of contempt of court for violation of the 1935 decree. The principal questions are:

1. Whether the decree entered by the District Court in 1935 was void for want of jurisdiction.

2. Whether petitioners, who were parties to the action in which the decree was entered, have standing to contend that the decree is not binding on successors in interest to the other New Mexico defendants to that action; and, if they have such standing, whether the decree is binding on such successors in interest.

STATEMENT

Petitioners were adjudicated guilty of contempt of court by reason of having violated an injunction entered in 1935 by the United States District Court for the District of Arizona, affecting and defining the water rights of the United States and

of the several defendants in the waters of the Gila River in Arizona and New Mexico. The facts, as found by the District Court (R. 130–142),[1] and as shown by the record, may be summarized as follows:

In 1925, the United States, on behalf of itself and of the Pima and Apache Indians, brought suit in the federal District Court for the District of Arizona, to have its priority rights in the waters of the Gila River judicially ascertained and protected (R. 3–25). The Gila River rises in New Mexico and flows west through Arizona to its junction with the Colorado River at Yuma, Arizona (R. 290). The United States named as defendants to its suit some 2,000 persons, individual and corporate, including the petitioners in this case, who claimed rights in the waters of the river (R. 3–4). Seventy-five of the defendants resided in New Mexico (R. 47–48). The relief requested was that the rights of the parties to the waters of the river and of its tributaries be determined, that the title of the United States to the water rights claimed by it for use on lands in Arizona be quieted, and that the defendants be enjoined from interfering with those water rights (R. 25).

All of the defendants, those in New Mexico as well as those in Arizona, entered a general appearance, answered the Government's complaint, and by way of cross-relief asked that their rights be ascertained as against the United States and as

[1] Unless otherwise indicated, the record references are to Volume I of the printed record.

among themselves (R. 26–44). In 1935, after ten years of protracted investigations and hearings, the parties "adjusted and settled their respective claims as between each other", signed a "stipulation for and consent to the entry of a final decree," and asked the court to adopt as its findings and to enter as its decree the stipulation which set forth "the respective rights of all parties" (R. II, p. 1 following decree). The court, pursuant to this stipulation, entered its decree on June 29, 1935, and retained jurisdiction to enforce and implement the provisions thereof (R. II, 112, 113).

The decree describes in detail the nature and extent of the rights of each party (R. II, 12–105); provides for the appointment of a water commissioner to carry out and enforce its provisions, with power to cut off water from the ditches of persons who disobey his orders; requires each diverter to install and maintain measuring and locking devices (Art. XII, R. II, 112); enjoins all parties, their assigns, successors in interest, agents, etc., from asserting or claiming, as against the parties, any right, title or interest, except the rights determined and allowed in the decree; perpetually enjoins each from diverting, taking, or interfering with the waters of the river so as to prevent or interfere with the diversion or use by other parties as provided in the decree; and provides that the decree shall inure to the benefit of grantees, assigns, and successors in interest of the owners of rights and the parties to the decree (Art. XIII, R. II, 113).

After the entry of the decree, the court appointed respondent C. A. Firth as Water Commissioner and, on December 9, 1935, directed that an annual assessment of 13¢ per acre be collected from each water user to meet the expenses of administering the decree (R. 58), and that headgates with adequate locking facilities and accurate measuring and automatic recording devices be installed (R. 59).

In the fall of 1938, certain water users in New Mexico, and particularly the officers of the Sunset Canal Company,[2] became dissatisfied with the 1935 decree and appealed to the Interstate Stream Commission of New Mexico for relief from its provisions (R. 223–225). That Commission, after an *ex parte* investigation, decided that the decree was inequitable and void, and instructed the New Mexico State Engineer to take over the administration of the waters of the Gila River (R. 95–97). Acting pursuant to these instructions and asserting that the Arizona court had lacked jurisdiction to enter the 1935 decree, the state engineer purported to establish a water district and appointed a water master to supervise the distribution of the waters of the Gila River among water users in New Mexico (R. 92–93).

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[2] Approximately 95% of the water diverted from the Gila River and used on lands of the New Mexico defendants to the original action passes through the ditches of the Sunset Canal Company. Petitioners without exception are supplied by this particular company, which does business in both New Mexico and Arizona (R. 143).

The Sunset Canal Company thereupon refused to pay the 13¢ assessment for the coming year (R. 140). Being in default and his demand having been refused, Water Commissioner Firth, on January 1, 1939, locked the headgates of the Sunset Canal Company and refused to deliver any water until the assessments were paid (R. 140). Three days later the state police cut off the locks and opened the headgates (R. 141, 218). Thereafter the waters were diverted and used by petitioners without regard for the 1935 decree (R. 141–142, 215).

It having become apparent that the New Mexico water users no longer intended to abide by the 1935 decree, Water Commissioner Firth and the United States Attorney for the District of Arizona asked the court below to issue a rule directing the present petitioners and certain other New Mexico water users, who were parties to the 1935 decree, to show cause why they should not be adjudged in contempt of court (R. 46–62). The rule was issued (R. 64), responses were filed (R. 77, 99) and evidence was taken (R. 167–278). On February 6, 1940, the District Court found that the petitioners had violated the terms of the decree and orders of the court and that they were in contempt (R. 108–109). On March 11, 1940, a judgment was entered adjudging the Sunset Canal Company and the present petitioners guilty of contempt and fining each of them $100 (R. 145–146). The court below affirmed (R. 318).

ARGUMENT

1. The principal question which petitioners seek to have this Court review is whether the federal District Court for the District of Arizona had jurisdiction to enjoin the New Mexico defendants to the original action, over whom the court had personal jurisdiction, from so diverting the waters of the Gila River as to encroach upon the water rights of the other parties to the action within Arizona. Petitioners contend (Pet. 6–12) that the court had no such jurisdiction and that the decree which it granted in 1935 was therefore void.

This contention is completely foreclosed by the decision of this Court in *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258.[3] There this Court held that a court within a downstream state may restrain upstream appropriators within another state, over whom the court has personal jurisdiction, from taking water in excess of their lawful rights, when necessary to protect diversion and storage rights within the downstream state. That decision, as the court below pointed out (R. 293–298), is fully applicable to the situation here presented.

The assertion of conflict between the decision in this case and the decision of the Circuit Court

[3] See also *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.*, 245 Fed. 9 (C. C. A. 9); *United States* v. *Walker River Irr. Dist.*, 11 F. Supp. 158, 168–170 (D. Nev.); *Willey* v. *Decker*, 11 Wyo. 496, 73 Pac. 210; *Taylor* v. *Hulett*, 15 Idaho 265, 97 Pac. 37.

of Appeals for the Tenth Circuit in *Albion-Idaho Land Co.* v. *Naf Irr. Co.*, 97 F. (2d) 439, is without substantial foundation. The relationship between the two cases is fully discussed in the opinion below (R. 302–305). As is there pointed out, the trial court, whose action was approved on appeal in the *Albion-Idaho* case, undertook to exercise jurisdiction over the whole of an interstate stream and to regulate the rights of water users in two different states, in very much the same manner as was done by the District Court's decree attacked in the present case. Although the opinion in the *Albion-Idaho* case does contain some dicta which would seem to be at variance with the decision of this Court in the *Miller & Lux* case,[4] the court purported to, and actually did, follow the *Miller & Lux* decision. Certainly the inclusion in the *Albion-Idaho* opinion of apparently inconsistent dicta is no reason for the grant of certiorari here, where the principles announced in the *Miller & Lux* case have been correctly applied.

2. The federal court in Arizona also had jurisdiction, in order to protect direct diversion and storage rights of water users in Arizona, to require locks and measuring devices to be installed in New

[4] It is apparent from the record and briefs in the *Albion-Idaho* case that the statement quoted by petitioner (Pet. 7) concerning the invalidity of the "Hart decree" is dictum, because neither side sought to have that decree enforced. Appellants merely asked to have the decree considered for its evidentiary value.

Mexico and to appoint a water commissioner to see that the decree was properly administered. The authorities are agreed that an equity court may command a person before it to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed. *Salton Sea Cases,* 172 Fed. 792 (C. C. A. 9), certiorari denied, 215 U. S. 603; *Vineyard Land & Stock Co.* v. *Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, 27–29 (C. C. A. 9).[5]

The 1935 decree is not in conflict with the law of New Mexico. That state, it is true, has established the office of state engineer with supervisory authority over the waters of the state. But it is not his practice nor his duty to take over streams already being administered under court decrees. And, if he does, such supervision must be in accordance with "the adjudications of the courts." N. M.

[5] See also Note, 35 Harv. L. Rev. 610; Note, 20 Ill. L. Rev. 594; Messner, Jurisdiction of Equity, 14 Minn. L. Rev. 494, 517–529. The cases in point are collected in 1 Chafee and Simpson, Cases on Equity (1934), pp. 208, 210; Note, 17 Harv. L. Rev. 572; Note, 23 Harv. L. Rev. 390; Note, 5 Ill. L. Rev. 442; Note, 31 Harv. L. Rev. 646; Note, 27 Yale L. J. 946; Note, 6 Cornell L. Q. 423; Note, 30 Yale L. J. 865; Note, 71 A. L. R. 1351. The American Law Institute in its Conflict of Laws Restatement (1934) states the rule in this fashion: "§ 94. A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." *Carpenter* v. *Strange,* 141 U. S. 87, relied on by petitioners (Pet. 10–11), stands for no contrary doctrine.

Stat. Ann. (Comp. 1929), sec. 151. In all their acts to date the New Mexico officials have been careful to state that the contemplated action was being taken because they believed the Arizona decree to be invalid (R. 231, 238–239). Once the validity of that decree is sustained, it is to be presumed that they will respect its provisions.

3. Petitioners assert (Pet. 9–10) that the 1935 decree is invalid because it attempts to bind successors in interest in New Mexico. Since the present petitioners were parties to the original decree, they are in no position to raise this question and cannot absolve themselves of their contumacious conduct by asserting that the decree is not binding on successors in interest. In any event, the contention is unsound. An injunction is effective not only against a party defendant but also against a successor in interest who has notice of its provisions. *In re Lennon,* 166 U. S. 548, 554; *Ahlers* v. *Thomas,* 24 Nev. 407, 56 Pac. 93. If a purchaser of water rights in an upstream state is bound to take notice of a water suit pending in a downstream state (see *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258, 262–263), then a *fortiori* a New Mexico successor in interest is required to take notice of a previous Arizona decree enjoining his grantor from impinging upon the rights of downstream appropriators in Arizona. *Pacific Live Stock Co.* v. *Rickey,* 8 F. Supp. 772 (D. Nev.). A contrary ruling would largely nullify the for-

ward step which this Court took in adapting legal theories to realities in the *Miller & Lux* case.

Furthermore, whatever be the effect of an injunction on successors in interest, it is plain that in this case all New Mexico water users, whether parties to the original suit or not, who receive water from the canals of the Sunset Canal Company, as these petitioners do, are bound by the provisions of the 1935 decree against the Sunset Canal Company. This follows from the fact that a canal or ditch company can sue or be sued on behalf of its water users, and the latter will be bound by the ensuing judgment, even though they were not parties to the suit. *Montezuma Canal* v. *Smithville Canal,* 218 U. S. 371, 382; *La Luz Com. Ditch Co.* v. *Town of Alamogordo,* 34 N. Mex. 127, 134–135, 279 Pac. 72; *Riverside Water Co.* v. *Sargent,* 112 Cal. 230, 235, 44 Pac. 560.[6]

[6] Petitioners cannot escape this principle by the plea that the Sunset Canal Company ceased to exist in 1921 (Pet. 12–13). That contention is without merit. The Sunset Canal Company is an existing corporation. It was organized in 1903 (R. 241); it has since transacted business, and continues to transact business, as a corporation (R. 131, 143). Since it is a "quasi public" rather than a "private" corporation (see *Albuquerque Land and Irrigation Co.* v. *Gutierrez,* 10 N. Mex. 177, 250, affirmed, 188 U. S. 545), and since it was not organized for profit, it was not required to file annual reports under the Act of March 15, 1917 (New Mexico Laws, 1917, c. 112, sec. 6), and consequently was not affected by the 1921 statute dissolving all "private corporations" which had failed to file annual reports. Act of June 14, 1921, New Mexico Laws, 1921, c. 185. Furthermore, because of their conduct during the litigation (R. 39) and since the decree

4. The various other contentions advanced in the petition for certiorari are fully answered in the opinion of the court below, and no useful purpose would be served by repeating that discussion here. Suffice it to say that none of these contentions raises a question warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1941.

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was entered (R. 132, 138–139, 194–197, 200), petitioners are estopped to deny the corporate existence of Sunset Canal Company. *Tulare Irrigation District* v. *Shepard*, 185 U. S. 1.

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